Supreme Court, U.S.
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No. _____
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In The

Supreme Court of the United States

STEPHEN JOHN HOLCOMBE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The City of Bedford, Texas, noise ordinance prohibits playing music "in such a manner as to . . . unreasonably disturb or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities." Is this ordinance unconstitutionally vague because it fails to put the citizenry on notice of what is prohibited, fails to contain objective standards, and gives the police unfettered discretion to determine what conduct amounts to a violation?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

CITATIONS TO THE OPINION AND RELEVANT ORDERS

On December 12, 2002, the Honorable Jake Cook, sitting in County Criminal Court Number Nine of Tarrant County, Texas, signed an Order adopting the State's proposed Order granting Petitioner's Motion to Suppress evidence. *State of Texas v. Stephen John Holcombe*, Cause Number 0846280 (Co. Crim. Ct. 9, Tarrant Co., Tex., December 12, 2002). A copy of the trial court's Order is attached in Appendix at App. 36-38.

In a published Opinion issued April 22, 2004, the Second Court of Appeals of Texas reversed the trial court's grant of Petitioner's pretrial Motion to Suppress evidence. *State v. Holcombe*, 145 S.W.3d 246 (Tex. App. – Fort Worth 2004). A copy of the Court of Appeals' Opinion and Judgment is attached in Appendix at App. 14-35. Subsequently, on July 15, 2004, the Second Court of Appeals denied Petitioner's Motion for Rehearing. *State v. Holcombe*, No. 02-02-515-CR, slip op. (Tex. App. – Fort Worth July 15, 2004) (Order denying reh'g). A copy of the Order denying rehearing is attached in Appendix at App. 39.

By an Order dated April 27, 2005, the Court of Criminal Appeals of Texas granted Petitioner's Petition for Discretionary Review. *State v. Holcombe*, No. PD-1297-04, slip op. (Tex. Crim. App. April 27, 2005). A copy of the Order granting the Petition for Discretionary Review is attached in Appendix at App. 40.

In a published opinion issued March 22, 2006, the Court of Criminal Appeals of Texas affirmed the decision of the Second Court of Appeals. *State v. Holcombe*, 187 S.W.3d 496 (Tex. Crim. App. 2006). A copy of the Court of Criminal Appeals' Opinion on the merits is attached in Appendix at App. 1-13.

GROUNDS FOR JURISDICTION

The Court of Criminal Appeals of Texas affirmed the judgment of the Second Court of Appeals of Texas on March 22, 2006. A copy of the Court of Criminal Appeals' Opinion appears at Appendix 5.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

United States Constitution, Amendment XIV

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. XIV, cl. 1.

City of Bedford, Texas, Noise Ordinance

> The following sounds are hereby determined to be specific noises which can constitute a noise disturbance, and violations of this article are hereby defined. . . .
>
> > (3) *Exterior loudspeakers.* Operating or permitting to be operated any loudspeaker or sound-amplifying equipment in a fixed or movable position mounted upon any vehicle in or upon any street, alley, sidewalk, park, place or public property for the purpose of commercial advertising, giving instructions, directions, talks, addresses, lectures, or transmitting music to any persons or assemblages of persons in such a manner as to violate the sound levels as listed in this chapter or to unreasonably disturb or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities, unless a permit of variance is first obtained.

BEDFORD, TEX., CODE OF ORDINANCES ch. 54, art. II, § 36(2) (2002).

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Nature of the Case

Petitioner was charged by criminal information with the Class B Misdemeanor Offense of Driving While Intoxicated. After a hearing, the trial court granted Petitioner's pretrial Motion to Suppress evidence. The State appealed the trial court's decision and the Second Court of Appeals

of Texas reversed the decision of the trial court. The Court of Criminal Appeals of Texas granted discretionary review and affirmed the decision of the Second Court of Appeals of Texas.

Course of Proceedings and Disposition Below

By a misdemeanor information filed May 24, 2002, Petitioner was charged with one count of driving while intoxicated in trial court cause number 0846280. [C.R.[1] 3] On November 21, 2002, Petitioner filed his Motion to Suppress alleging that he was illegally arrested without a warrant and requesting that all evidence obtained as a result of the illegal stop and arrest be suppressed. [C.R. 12-13] That same day, the trial court conducted an evidentiary hearing on the Motion to Suppress. [R.R. 3-27] On December 12, 2002, the trial court entered a formal written order granting the Motion to Suppress. [C.R. 14-16]

The State timely filed its written Notice of Appeal on December 23, 2003. [C.R. 18-19] The Second Court of Appeals reversed the trial court's judgment on April 22, 2004. *See State v. Holcombe*, 145 S.W.3d 246 (Tex. App.–Fort Worth 2004).

After receiving two extensions of time from the court of appeals, Petitioner timely filed his Motion for Rehearing on July 12, 2004. On July 15, 2004, the court of appeals overruled the Motion for Rehearing.

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[1] Hereinafter, the abbreviation C.R. will be used as citation for the Clerk's Record and the abbreviation R.R. will be used as citation for the Reporter's Record.

On September 15, 2004, after receiving one extension of time, Petitioner timely filed his Petition for Discretionary Review seeking review of the Second Court of Appeals' decision by the Court of Criminal Appeals of Texas. On April 27, 2005, the Court of Criminal Appeals granted the Petition for Discretionary Review.

On March 22, 2006, the Court of Criminal Appeals of Texas affirmed the decision of the Second Court of Appeals. *See State v. Holcombe*, 187 S.W.3d 496 (Tex. Crim. App. 2006).

The Relevant Facts

On May 19, 2002, at approximately 2:30 a.m., Petitioner was driving a white Mercedes in Bedford, Texas. [R R. 5] Two Bedford Police officers stopped Petitioner for suspicion of violating the Bedford Noise Ordinance. [R.R. 5, 17] The officers did not observe any suspicious driving facts or moving violations prior to the stop. [R.R. 7, 19-20] Further, the officers had not received any type of information from any other source indicating that the driver of the Mercedes had broken any law other than the Bedford Noise Ordinance. [R.R. 7]

Following the initial stop based on the alleged violation of the Bedford Noise Ordinance, the officers observed various signs of intoxication and eventually placed Petitioner under arrest for suspicion of driving while intoxicated.

ARGUMENT AND AUTHORITIES

THE CITY OF BEDFORD, TEXAS, NOISE ORDINANCE, WHICH PROHIBITS PLAYING MUSIC "IN SUCH A MANNER AS TO ... UNREASONABLY DISTURB OR INTERFERE WITH THE PEACE, COMFORT AND REPOSE OF NEIGHBORING PERSONS OF ORDINARY SENSIBILITIES" IS UNCONSTITUTIONALLY VAGUE BECAUSE IT FAILS TO PUT THE CITIZENRY ON NOTICE OF WHAT IS PROHIBITED, FAILS TO CONTAIN OBJECTIVE STANDARDS, AND GIVES THE POLICE UNFETTERED DISCRETION TO DETERMINE WHAT CONDUCT AMOUNTS TO A VIOLATION.

A. The Ordinance at Issue

The City of Bedford Noise Ordinance that Petitioner was stopped for allegedly violating outlaws the following conduct:

> Operating or permitting to be operated any radio receiving set, musical instrument, television phonograph, drum or other machine or device for the production or reproduction of sound *in such a manner as to ... unreasonably disturb or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities. ...*

BEDFORD, TEX., CODE OF ORDINANCES ch. 54, art. II, § 36(2) (2002) (emphasis added) (hereinafter, "the Ordinance").[2]

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[2] The full text of the City of Bedford Code of Ordinances is available at http://www.municode.com/Resources/gateway.asp?pid=11924&sid=43.

B. Proceedings in the Trial Court

The trial court heard the Motion to Suppress and ruled that the Ordinance, "doesn't tell you what the violation really is" and "just leaves it up to the discretion of any officer or anybody else. . . ." [R.R. 27] Accordingly, the trial court ruled that the Ordinance is unconstitutional because it "doesn't place the public on sufficient notice of what they can be charged with" and "it's just another excuse for getting an officer in . . . somebody's car." [R.R. 27] In this manner, the trial court ruled that the Ordinance was unconstitutionally vague. The trial court also ruled that the Ordinance was unconstitutionally over broad. [R.R. 27]

C. Proceedings in the Court of Appeals

The State appealed the trial court's granting of the Motion to Suppress. In its first four points of error on appeal, the State argued that the Ordinance is not unconstitutionally over broad. [State's Br. at 13-24] The court of appeals held that the Ordinance is not over broad and sustained the State's first four points of error.[3] *Holcombe*, 145 S.W.3d at 250-53.

In its fifth and sixth points of error on appeal, the State argued that the trial court had erred by holding that the Ordinance was unconstitutionally vague. [State Br. at 25-28] The court of appeals agreed with the State and sustained her fifth and sixth points of error. *Id.* at 253-54.

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[3] Although he does not concede that the court of appeals' holding with regard to the State's first four points of error is correct, Petitioner did not challenge that holding before the Court of Criminal Appeals of Texas.

In holding that the noise ordinance is not unconstitutionally vague, the court of appeals found that the phrase "unreasonably disturb or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities" amounted to a collection of words that have "commonly understood meanings" and established an "objective reasonable person standard" for determining if a noise was so loud that it would come within the purview of the noise ordinance. *Id.* at 254. Thus, the court of appeals concluded that the noise ordinance "describes the prohibited conduct and does not permit arbitrary or discriminatory enforcement." *Id.* at 255.

Having held that the Ordinance is not unconstitutionally over broad or vague, the court of appeals did not address the State's seventh point of error arguing that the stop of Petitioner's vehicle was reasonable. *Id.* at 255.

Justice Dauphinot filed a dissenting opinion in which she argued that the Ordinance is unconstitutionally vague because it fails to "afford fair notice of the prohibited conduct" and because it fails "to establish objective standard for determining whether a violation has occurred." *Id.* at 255-57 (Dauphinot, J., dissenting). Justice Dauphinot further noted that, "[t]he consequence of such failures is to leave the police officers the unbridled discretion to judge whether a violation of the ordinance has occurred." *Id.* at 257. Accordingly, Justice Dauphinot "would hold that the trial court did not err in declaring the Bedford ordinance unconstitutional and granting [Petitioner's] motion to suppress." *Id.*

D. Proceedings in the Court of Criminal Appeals

After granting discretionary review, the Court of Criminal Appeals affirmed the decision of the court of appeals:

> We agree with the State that the Bedford noise ordinance contains objective criteria for determining what conduct is prohibited and therefore does not permit arbitrary enforcement. The ordinance clearly establishes an objective reasonable-person standard by referring to "neighboring persons of ordinary sensibilities" and banning noise that "unreasonably disturb[s] or interfere[s] with the peace, comfort and repose" of such persons. These words describe noise of the type or volume that a reasonable person would not tolerate under the circumstances.
>
> . . . .
>
> Because we are limited to the use of words, we cannot demand mathematical certainty from our language. Although the Bedford noise ordinance does not define "noise" or "unreasonably disturb or interfere," words not defined are to be given their plain meaning. In determining the plain meaning of a word, we initially look to dictionary definitions. "Noise" commonly means a loud, confused, or senseless outcry; or a sound noticeably loud, harsh, or discordant. "Unreasonable" is an objective, reasonable-man standard. The noise ordinance thus creates an objective standard that ensures that persons of ordinary intelligence know when a particular noise is too loud. Such objectivity prevents broad discriminatory or subjective enforcement by the police. Although the noise ordinance does allow a degree of

> police judgment, that judgment is confined to the judgment of a reasonable person.

Holcombe, 187 S.W.3d at 499-500 (footnotes and citations omitted). Accordingly, the Court of Criminal Appeals held that the Ordinance is not unconstitutionally vague and affirmed the judgment of the Court of Appeals. *Id.* at 501.

E. Analysis

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). *See also*, U.S. CONST. amend. XIV. Therefore, laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. *See also*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (holding vagrancy statute unconstitutional because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute" (citations omitted)).

Additionally, "laws must provide explicit standards for those who apply them," otherwise, a the law "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. 108-09. *See also*, *Papachristou*, 405 U.S. at 162 (holding vagrancy statute unconstitutional because it "encourages arbitrary and erratic arrests and convictions").

Finally, statutes must not be so vague as to impinge on the First Amendment by leading citizens to "steer far

wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (citations and internal quotations omitted). *See also*, U.S. CONST. amend. I.

Contrary to the Court of Criminal Appeals' holding, the Ordinance does not sufficiently describe the prohibited conduct so as to place the citizenry on notice of what is prohibited and the Ordinance permits arbitrary and discriminatory enforcement by the police in violation of the due process guarantee of the Fourteenth Amendment.

1. The Ordinance Does Not Put the Citizenry on Notice of What is Prohibited

The phrase "unreasonably disturb or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities" is not specific enough to put the citizenry on notice of what is prohibited.

In a similar situation, this Court found that the word "annoy" was inherently vague as it was used in a city ordinance which made it a criminal offense for "three or more persons to assemble . . . on any of the public sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by." *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). In *Coates*, this Court noted that the word "annoy," as used in the ordinance, was vague, because "[c]onduct that annoys some people does not annoy others." *Id.* at 614. Accordingly, this Court held that the ordinance was "vague, not in the sense that it require[d] a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct [was] specified at all." *Id.*

The terms "unreasonably disturb or interfere" and "peace, comfort and repose" found in the Ordinance are certainly no more specific than the inherently vague term "annoy" which was struck down in *Coates*.

Additionally, the term "neighboring persons" is undefined and vague. Is a "neighboring person" someone who is driving by in a car? Is it someone whose residence is within a certain distance of the source of the noise? Is it someone who just happens to be walking by?

The ordinance gives no guidance as to who constitutes a "neighboring person" which also renders the statute unconstitutionally vague. *See Coates*, 402 U.S. at 613 (pointing out that the unconstitutionally vague ordinance "did not indicate upon whose sensitivity a violation does depend – the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man"); *Holcombe*, 145 S.W.3d at 257 (Dauphinot, J., dissenting) ("Indeed, in the case before us, the police officers alone determined who were 'neighboring persons.'").

2. The Ordinance Does Not Contain Objective Standards and Gives Police Unfettered Discretion to Determine Who is in Violation

The Ordinance does not set out any objective standard for determining if a noise is so loud as to violate the terms of the Ordinance, i.e., there is no specific decibel level or requirement that the noise can be heard at a specific distance under specific circumstances. Without such objective standards to limit the conduct encompassed by the noise ordinance, the police officers charged with enforcing the ordinance have unfettered discretion to

determine whether a particular noise is so loud as to violate the statute. *See Holcombe*, 145 S.W.3d at 257 (Dauphinot, J., dissenting). As this Court has noted, "Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." *Papachristou*, 405 U.S. at 170.

Accordingly, because the Ordinance does not contain objective standards and gives the police unfettered discretion to determine what conduct amounts to a violation, the Ordinance is unconstitutionally vague. *E.g.*, *id.* at 168 ("Another aspect of the ordinance's vagueness appears when we focus, not on the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of the . . . police.").

Other jurisdictions have not hesitated to find similar ordinances unconstitutionally vague on these same grounds. *See, e.g.*, *Phillips v. Borough of Folcroft, Pennsylvania*, 305 F. Supp. 766, 770-71 (E.D. Penn. 1969) (holding that disorderly conduct ordinance that prohibited "the making of loud and/or unnecessary noises" was unconstitutionally vague because the term "loud noise" was too imprecise and allowed police to exercise unfettered discretion in choosing who violated the ordinance); *Lutz v. City of Indianapolis*, 820 N.E.2d 766, 769-71 (Ind. Ct. App. 2005) (holding that ordinance prohibiting the "playing, using or operating . . . any radio . . . or device for producing or reproducing sound in such a manner as to disturb the peace, quiet and comfort of the neighboring inhabitants" was unconstitutionally vague because it prohibits a "myriad of noises" rather than being narrowly tailored and does not include an objective test); *United Pentecostal*

Church v. Steendam, 214 N.W.2d 866, 867 (Mich. Ct. App. 1974) (holding that ordinance prohibiting the playing of a radio "in such a manner as to disturb the peace, quiet and comfort of the neighboring inhabitants" was unconstitutionally vague because "the language fails to establish sufficient ascertainable standards of conduct"); *People v. New York Trap Rock Corp.*, 442 N.E.2d 1222, 1226-27 (N.Y. 1982) (holding that ordinance prohibiting "any excessive or unusually loud sound or any sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a person" was unconstitutionally vague because ordinance "impermissibly would support a conviction on any sound which annoys another person"); *City of Columbus v. Becher*, 184 N.E.2d 617, 618 (Ohio Ct. App. 1961) (holding that ordinance prohibiting noise made by animals that resulted in "annoyance of the inhabitants of this city" was unconstitutionally vague because "[i]t leaves to the court or jury, in a legislative capacity, the fixing of the degree or amount of 'annoyance' before the guilt of the accused is established"), *aff'd*, 180 N.E.2d 836 (Ohio 1962); *City of Spokane v. Fischer*, 754 P.2d 1241, 1242-43 (Wash. 1988) (holding that ordinance prohibiting property owner from allowing a dog "to disturb or annoy any other person or neighborhood by frequent or habitual howling, yelping or barking" was unconstitutionally vague because "[t]he crux of the ordinance is that it gives to any person who feels a dog's frequent or habitual barking is annoying or disturbing the power to make a subjective determination a crime has been committed" and "provides neither adequate notice to citizens of unlawful conduct nor adequate standards to prevent its arbitrary enforcement").

F. Conclusion

In sum, the Bedford Noise Ordinance fails to contain specific enough language to put the citizenry on notice of what conduct is prohibited and fails to contain objective standards which effectively gives the police unfettered discretion to determine if a violation has occurred. Accordingly, the Ordinance is unconstitutionally vague and the Court of Criminal Appeals' holding to the contrary is in conflict with several decisions of this Court. *See* SUP. CT. R. 10(c).

Further, to the extent that the Court of Criminal Appeals has interpreted an ordinance that contains no objective standards to be Constitutional, the court of appeals has decided an important question of Federal Constitutional law that has not been, but should be, settled by this Court. *See id.*

Under these circumstances, this Court should grant this Petition and address on the merits the issue of whether or not the Ordinance withstands Constitutional scrutiny.

PRAYER

Petitioner therefore prays that this Court will grant this Petition, order such further briefing as this Court feels appropriate, and reverse and remand the decision of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1297-04

THE STATE OF TEXAS

v.

STEVEN JOHN HOLCOMBE, Appellee

ON APPELLEE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND COURT OF APPEALS TARRANT COUNTY

Keller, J., ***delivered the opinion of the Court in which PRICE, WOMACK, KEASLER, HOLCOMB and COCHRAN JJ., joined. HERVEY, J., filed a concurring opinion in which KEASLER, J., joined. JOHNSON, J., concurred in the result. MEYERS, J. not participating.***

The question in this case is whether a city ordinance that prohibits playing music "in such a manner as to . . . unreasonably disturb or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities" is unconstitutionally vague because it fails to put the citizenry on notice of what is prohibited, fails to contain objective standards, and gives the police unfettered discretion to determine what conduct amounts to a violation.

The answer to this question is "no." Consequently, we affirm the judgment of the Court of Appeals.

I. BACKGROUND

On May 19, 2002, at approximately 2:30 a.m., two Bedford police officers, Joseph Riley and William Mack, responded for the second time that night to complaints about a loud-noise disturbance created by a house party. The officers issued a citation for violating Bedford's noise ordinance.

While returning to his patrol car, Officer Riley heard, from approximately seventy-five yards away, loud music playing from appellee's white Mercedes. The officer testified that appellee's music was louder than the noise at the party for which he had just written a citation. He further testified that the Bedford noise ordinance is a general noise ordinance that is not specific to residences. Officer Mack testified that the music was "extremely" loud from one hundred twenty and one hundred fifty feet away. Because the officers were called to the neighborhood in response to a loud noise disturbance call, and Officer Riley believed appellee was violating the Bedford noise ordinance, they pulled him over and asked him to turn down his music. While speaking to appellee through the sunroof of the car, Officer Riley smelled alcohol and noticed that appellee's speech was slurred and his eyes appeared to be bloodshot. It appeared to the officer that appellee was under the influence of alcohol, so he intended to keep speaking to him, but appellee apologized and drove off. Officer Riley then radioed Officer Mack, who was about seventy-five yards down the street, and asked him to stop

appellee. Appellee subsequently was arrested for driving while intoxicated.

Appellee was charged by a misdemeanor information with driving while intoxicated. He filed a motion to suppress evidence, in which he alleged that he was illegally arrested without a warrant, and thus he requested that all evidence obtained as a result of the illegal arrest be suppressed. Following a pretrial evidentiary hearing, the trial court granted appellee's motion. The court ruled that the Bedford noise ordinance is unconstitutional because it is overbroad and vague for its failure to place the public on sufficient notice. The State appealed, and the Second Court of Appeals reversed the trial court's judgment, concluding that the ordinance is not unconstitutionally overbroad[1] or vague because it "describes the prohibited conduct and does not permit arbitrary or discriminatory enforcement."[2] Appellee's motion for rehearing was overruled.

Appellee filed a petition for discretionary review, arguing, among other things, that the Bedford noise ordinance is unconstitutionally vague because it fails to provide notice of the prohibited conduct, fails to contain objective standards, and gives the police unfettered discretion to determine what conduct violates the ordinance. We granted review and now turn to that issue.

---

[1] Appellee does not challenge the Court of Appeals's holding regarding the overbreadth claim.

[2] *Holcombe*, 145 S.W.3d at 253, 255.

II. THE ORDINANCE

The Bedford ordinance provides:

> The following sounds are hereby determined to be specific noises which can constitute a noise disturbance, and violations of this article are hereby defined. A noise does not have to exceed the specifications for environmental sound levels contained in section 12-53[3] in order to constitute a violation of this section.

---

[3] Section 12-53, recodified at BEDFORD, TEX., CODE OF ORDINANCES ch. 54, art. II, § 36 (2002), states:

> (a) It shall be a violation of this article for any person to operate or permit to be operated any stationary source of sound which creates a unit percentile sound level (L1) greater than the sound pressure level (L90) as set forth in this article, or creates a tenth percentile sound level (L10) or a ninetieth percentile sound level (L90) which exceeds the limits set forth in this article for the land use receiving the sound when measured at the property boundary of the receiving land.
>
> (b) For the purpose of enforcement, a sound measurement period shall not be less than ten minutes nor more than 30 minutes.
>
> (c) Sound level limits.
>
> (1) Limiting sound levels, 7:00 a.m. to 9:00 p.m.
>
> TABLE INSET:

Category	L90	L10
Residential	55 dBA	65 dBA
Commercial	62 dBA	72 dBA
Industrial	75 dBA	85 dBA

> (2) Limiting sound levels, 9:00 p.m. to 7:00 a.m.
>
> TABLE INSET:

Residential	50 dBA	60 dBA
Commercial	57 dBA	67 dBA
Industrial	75 dBA	85 dBA

(Continued on following page)

. . .

> *(2) Radios, television sets, musical instruments and similar devices.* Operating or permitting to be operated any radio receiving set, musical instrument, television, phonograph, drum or other machine or device for the production or reproduction of sound in such a manner as to violate the sound levels of this article or to unreasonably disturb or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities, unless a permit of variance is first obtained.

BEDFORD, TEX., CODE OF ORDINANCES ch. 54, art. II, § 36 (2002).

III. ANALYSIS

It is a basic principle of due process that a statute is void for vagueness if its prohibitions are not clearly defined.[4] The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not permit arbitrary and discriminatory enforcement.[5] Although a statute is not impermissibly vague because it fails to define words or phrases,[6] it is invalid if it fails to

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> When a noise source can be identified and its noise measured in more than one land use category, the limits of the most restrictive use shall apply at the boundary and within the most restrictive land use category.

[4] *See, e.g., Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972).

[5] *E.g., Kolender v. Lawson,* 461 U.S. 352, 357 (1983).

[6] *Engelking v. State,* 750 S.W.2d 213, 215 (Tex.Crim.App.1988).

give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited.[7] Moreover, where, as here, a statute does not substantially implicate constitutionally protected conduct or speech, it is valid unless it is impermissibly vague in all applications.[8]

Appellee argues that the Bedford noise ordinance is impermissibly vague because it does not give reasonable notice of the conduct the ordinance prohibits, nor provide an objective standard for determining when the ordinance is violated, such as a specific decibel level or a specific distance from which the noise is audible. He claims that the lack of notice or objective criteria in the ordinance gives police officers unlimited discretion to determine if the noise is sufficiently loud to constitute a violation.

The State argues that the ordinance is not unconstitutionally vague because it is couched in terms of objective reasonableness. Because the ordinance employs the word, "unreasonably," it provides an objective standard of evaluation. By grounding a noise ordinance in terms of reasonableness, the ordinance is not rendered unconstitutionally vague.

We agree with the State that the Bedford noise ordinance contains objective criteria for determining what conduct is prohibited and therefore does not permit arbitrary enforcement. The ordinance clearly establishes an objective reasonable-person standard by referring to "neighboring persons of ordinary sensibilities" and banning noise that "unreasonably disturb[s] or interfere[s]

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[7] *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)

[8] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

with the peace, comfort and repose" of such persons.[9] These words describe noise of the type or volume that a reasonable person would not tolerate under the circumstances.[10]

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[9] Like the Bedford noise ordinance, the Model Penal Code relies on the term "unreasonable" in this context. The model law prohibits persons from making "unreasonable" noise "with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof." MODEL PENAL CODE § 250.2(1)(b) (1962). The great majority of courts that have reviewed ordinances patterned on the Code or employing the phrase "unreasonable noise," like the Code, have upheld the ordinances against challenges of unconstitutional vagueness. *See Price v. Indiana,* 622 N.E.2d 954 (Ind.1993); *People v. Bakolas,* 449 N.E.2d 738 (N.Y. 1983) (per curiam); *Commonwealth v. Mastrangelo,* 414 A.2d 54 (Pa. 1980), *appeal dismissed sub nom., Mastrangelo v. Commonwealth,* 449 U.S. 894 (1980); *People v. Fitzgerald,* 573 P.2d 100 (Colo. 1978); *State v. Marker,* 536 P.2d 1273 (Or. 1975); *State v. Johnson,* 542 P.2d 808 (Ariz. 1975); *State v. Anonymous,* 298 A.2d 52 (Conn. 1972); *Heard v. Rizzo,* 281 F.Supp. 720 (E.D. Pa. 1968), *aff'd per curiam* 392 U.S. 646 (1968); *Hess v. State,* 297 N.E.2d 413 (Ind. 1973), *rev'd on other grounds sub nom., Hess v. State,* 414 U.S. 105 (1973).

[10] Because the Bedford noise ordinance employs the phrase, "neighboring persons of ordinary sensibilities," to describe a reasonable person, it is more definite than, for instance, the dog barking ordinance in *State v. Singer,* 945 P.2d 359, 361-62 (Ariz. Ct. App. 1997), which provides that "no person shall keep a dog within the City limits which is in the habit of barking or howling or disturbing the peace and quiet of *any person* within the City." (emphasis added). Yet, the court in *Singer* found inherent in the phrase "any person" a presumption that the person be a reasonable person, and thus upheld the ordinance against an unconstitutional vagueness challenge because it was capable of objective measurement. *Id.* at 362; *see also Town of Baldwin v. Carter,* 794 A.2d 62 (Me. 2002) (importing a reasonable person standard into a dog barking ordinance to hold that it was not unconstitutionally vague). In this case, there is no need to import a reasonable person standard into the Bedford noise ordinance because the ordinance explicitly uses objective language and thus gives sufficiently definite notice of the prohibited conduct for purposes of due process.

Because we are limited to the use of words, we cannot demand mathematical certainty from our language.[11] Although the Bedford noise ordinance does not define "noise" or "unreasonably disturb or interfere," words not defined are to be given their plain meaning.[12] In determining the plain meaning of a word, we initially look to dictionary definitions.[13] "Noise" commonly means a loud, confused, or senseless outcry; or a sound noticeably loud, harsh, or discordant.[14] "Unreasonable" is an objective, reasonable-man standard.[15] The noise ordinance thus creates an objective standard that ensures that persons of ordinary intelligence know when a particular noise is too loud. Such objectivity prevents broad discriminatory or subjective enforcement by the police. Although the noise ordinance does allow a degree of police judgment, that judgment is confined to the judgment of a reasonable person.

Here, the ordinance gave appellee adequate notice that blaring music from his car stereo at 2:30 a.m. was prohibited. His conduct falls within the conduct proscribed by the Bedford noise ordinance. His claim of lack of notice fails.

Because the noise ordinance provides sufficient notice of the prohibited conduct,[16] it is unnecessary, for constitutional

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[11] *Grayned*, 408 U.S. at 110.

[12] *Parker v. State*, 985 S.W.2d 460, 464 (Tex. Crim. App. 1999).

[13] *Ex parte Rieck*, 144 S.W.3d 510, 512 (Tex. Crim. App. 2004).

[14] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1533 (1981).

[15] *See, e.g., Bakolas*, 449 N.E.2d at 738.

[16] Indeed, the objective "reasonableness" test is used in many areas of the law as an appropriate determinant of liability and thus a guide to conduct. *See Price*, 622 N.E.2d at 967. In *Cameron v. Johnson*, 390 U.S.

(Continued on following page)

purposes, for the ordinance to include explicit prohibitions of noise above a certain decibel level or noise that can be heard at a certain distance.[17] The words of the Bedford noise ordinance are "marked by flexibility and reasonable breadth, rather than meticulous specificity," and the conduct that is prohibited is sufficiently definite to satisfy due process.[18]

We hold that the Bedford noise ordinance is not unconstitutionally vague, and we affirm the judgment of the Court of Appeals.

KELLER, Presiding Judge

Date delivered: March 22, 2006
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611, 616 (1968), for instance, the Supreme Court responded to a defendant's vagueness complaint as to a picketing ordinance, which prohibited only "picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses . . . ", by stating that "the term 'unreasonably interfere' plainly requires no 'guess[ing] at [its] meaning'." The court determined that, because the ordinance employs the term "unreasonably" – a widely used and well understood word, especially when juxtaposed with "interfere" – the ordinance is "a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be . . . proscribed." *See id.* (quoting *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963)).

[17] *See Blanco v. State*, 761 S.W.2d 38, 41 (Tex. App. – Houston [14th Dist.] 1988, no pet.) (finding that a decibel requirement in a noise ordinance would render it "rigid and inflexible"). In our opinion, distance and decibel level standards are not only unnecessary, but not usually helpful to the ordinary person because people do not carry around yardsticks or decibel meters.

[18] *Grayned*, 408 U.S. at 110.

Hervey, J., *filed a concurring opinion in which* Keasler, J., *joined.*

CONCURRING OPINION

The trial court granted appellee's motion to suppress based on its decision that the City of Bedford noise ordinance is unconstitutional. The Court of Appeals also addressed that issue. The constitutionality of the ordinance is, therefore, properly before this Court.[1]

The police were in a residential neighborhood at 2:30 a.m. in response to complaints about a loud party at a house where the police issued a citation for violating the City of Bedford noise ordinance. *See State v. Holcombe,* 145 S.W.3d 246, 248-49 (Tex.App. – Fort Worth 2004). Appellee was driving through the neighborhood with his car stereo playing music louder than the noise at the house. *See id.* A police officer flagged appellee down and asked him to turn down the volume of his car stereo. *See id.* The officer immediately noticed that appellee was probably intoxicated. *See id.* Appellee turned down the volume of his car stereo and drove off. *See id.* Suspicious that appellee was intoxicated, the police stopped appellee's car again and eventually arrested him for DWI. *See id.*

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[1] The ground upon which the Court granted review states:

> Is a city ordinance that prohibits playing music "in such a manner as to . . . unreasonably disturb or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities" unconstitutionally vague because it fails to put the citizenry on notice of what is prohibited, fails to contain objective standards, and gives the police unfettered discretion to determine what conduct amounts to a violation?

Evidently believing that the police acted unreasonably under the Fourth Amendment when they stopped appellee and asked him to turn down his car stereo at 2:30 a.m. in a residential neighborhood, appellee filed a motion to suppress "all evidence" in the DWI case. Appellee's motion to suppress made no claim that the police were enforcing an unconstitutional noise ordinance when they stopped appellee's car and asked him to turn down the volume of his car stereo.[2] At the suppression hearing, appellee limited his written suppression motion to the initial stop, however, at the suppression hearing, the constitutionality of the noise ordinance became the dispositive issue.

The police officer (Riley) who initially flagged appellee down testified at the suppression hearing that he did not believe that appellee was "tied" to the house where the police had issued a citation for violating the noise ordinance. Riley testified that his initial stop of appellee's car "was to do with the city ordinance" even though he did not intend "to cite [appellee] for loud noise."

> Q. [STATE]: Okay. How – Okay, let me ask you this. After you heard [appellee's] vehicle, what did you do?
>
> A. [RILEY]: I looked up, watched the vehicle come towards me. Because the music was so loud and because I had just come from a loud noise disturbance where I issued a citation, I flagged

[2] Appellee's motion to suppress asserted that appellee's arrest was "without valid warrant or reasonable suspicion or probable cause." The motion to suppress further asserted that the "officer's reason to seize the defendant's vehicle cannot reach beyond the burden of reasonable suspicion because the officer did not witnesses [sic] an offense of anything's [sic] out of the ordinary or did the officer observe anything other than valid non-suspicious activity."

> [appellee] down just to have him turn the stereo down inside his car.
>
> Q. Okay. So would it be safe to say then the reason you stopped the vehicle was to do with the city ordinance?
>
> A. Yes, sir, loud noise violation.
>
> Q. Were you going to cite him for loud noise?
>
> A. No, sir, I was not. I was just going to have him turn the stereo down.

In closing arguments to the trial court both parties agreed that the initial stop of appellee by the police related to the noise ordinance. The State claimed that the stop was valid because Riley was "fully within his legal right to make contact with [appellee] and ask him to turn the radio down." Appellee claimed that the stop was invalid "because very loud music by itself is not definite enough." The trial court granted appellee's motion to suppress "all evidence" based on its finding that the "stop of [appellee] was invalid because the City of Bedford noise ordinance which was the basis for the initial stop of [appellee] is unconstitutional due to its being overbroad."[3]

I agree with the Court that the City of Bedford noise ordinance does not violate the Constitution. I write separately only to suggest that this holding should not be read to foreclose other issues that might have some bearing on whether evidence in cases like this should be excluded or

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[3] This apparently is an application of the federal constitutional "fruit of the poisonous tree" doctrine which generally requires the exclusion of evidence that is the "fruit" of a violation of a defendant's rights. *See generally Wong Sun v. United States*, 371 U.S. 471 (1963); *Kothe v. State*, 152 S.W.3d 54, 60-61 (Tex.Cr.App. 2004).

suppressed. *See, e.g., Illinois v. Krull,* 480 U.S. 340, 349-50 (1987) (federal exclusionary rule inapplicable when police reasonably rely on a statute later deemed unconstitutional); Article 38.23(a), TEX. CODE CRIM. PROC., (plain language requiring exclusion of evidence "obtained" in violation of the law arguably does not require exclusion of "fruits" evidence); *State v. Daugherty,* 931 S.W.2d 268, 270-71 (Tex.Cr.App. 1996) (discussing meaning of "obtained" in Article 38.23(a)); *Chavez v. State,* 9 S.W.3d 817, 823 (Tex.Cr.App. 2000) (Price, J., concurring) (Article 38.23(a) should apply only where a defendant's personal or property rights are illegally violated in the obtainment of evidence against him).

With these comments, I join the Court's opinion.

Hervey, J.

Filed: March 22, 2006
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[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-02-515-CR

THE STATE OF TEXAS — STATE

V.

STEPHEN JOHN HOLCOMBE — APPELLEE

FROM COUNTY CRIMINAL COURT NO. 9
OF TARRANT COUNTY

OPINION

The State appeals the trial court's order granting Appellee Stephen John Holcombe's motion to suppress. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On May 19, 2002, at approximately 2:30 a.m., Bedford police officer Joseph Riley and his partner William Mack responded to a call regarding a loud-noise disturbance. According to Riley, the officers were responding for the second time that evening to complaints made about a loud party at a house located on Vicksburg Drive. Riley testified that since it was their second visit to the scene, the officers issued a citation for violating Bedford's noise ordinance, which states:

> The following sounds are hereby determined to be specific noises which can constitute a noise disturbance, and violations of this article are hereby defined. A noise does not have to exceed the specifications for environmental sound levels contained in section 12-53 in order to constitute a violation of this section.
>
> . . . .
>
> (2) *Radios, television sets, musical instruments and similar devices.* Operating or permitting to be operated any radio receiving set, musical instrument, television, phonograph, drum or other machine or device for the production or reproduction of sound in such a manner as to violate the sound levels of this article or to unreasonably disturb or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities, unless a permit of variance is first obtained.

BEDFORD, TEX., CODE OF ORDINANCES ch. 54, art. II, § 36 (2002).[1]

After issuing the citation, Riley stated that as he headed back to his patrol car, he noticed Appellee's white Mercedes approximately seventy-five yards away playing loud music. Riley testified that Appellee's music was louder than the noise at the party for which he had just

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[1] At the time of Appellant's arrest, a prior version of the Bedford noise ordinance was in effect. The current version, enacted only nine days later, differs only in its references to other "articles" within the ordinance whereas the prior version uses the term "chapters." For clarity, we will refer to the current version of the Bedford ordinance. *See* BEDFORD, TEX., CODE 1969 § 12-50-12-57 (recodified at BEDFORD, TEX., CODE OF ORDINANCES ch. 54, art. II (2002)).

written a citation and that the Bedford noise ordinance is a general noise ordinance that is not specific to residences. Mack testified that he was between one hundred twenty and one hundred fifty feet away from the car and described the music as "extremely" loud. Because the officers were called to the neighborhood in response to a loud noise disturbance call and Riley believed Appellee was violating the Bedford noise ordinance, Riley flagged down the car and asked Appellee to turn down his music. Riley, speaking to Appellee through the sunroof of the car because the other windows were rolled up, noticed a strong odor of an alcoholic beverage and that Appellee's speech was slurred. Riley also testified that Appellee's eyes appeared to be bloodshot. According to Riley, Appellee appeared to be under the influence of alcohol and he intended to keep speaking to him, but Appellee said he was sorry and drove off. Riley radioed ahead to Mack, who was about seventy-five yards down the street and asked him to stop Appellee. Appellee was arrested for driving while intoxicated.

After a hearing on November 21, 2002, the trial court granted Appellee's motion to suppress and announced on the record that the grounds for suppression were that the Bedford noise ordinance is unconstitutional because it is overbroad and does not place the public on sufficient notice. The trial court subsequently adopted the State's proposed order, which stated that the trial court's suppression was based on the fact that the ordinance is overbroad. This appeal ensued.

STANDARD OF REVIEW

A trial court's ruling on a motion to suppress evidence will not be set aside absent an abuse of discretion. *Taylor*

v. State, 945 S.W.2d 295, 297 (Tex.App. – Houston [1st Dist.] 1997, pet. ref'd). We review a trial court's ruling on a motion to suppress using the bifurcated standard of review set forth in *Guzman v. State*. 955 S.W.2d 85 (Tex. Crim. App. 1997). We defer to the trial court's determination of the historical facts and rulings on mixed questions of law and fact. *Id.* at 87-88; *Morfin v. State*, 34 S.W.3d 664, 666 (Tex.App. – San Antonio 2000, no pet.). However, we decide de novo whether the trial court erred in misapplying the law to the facts. *Carmouche v. State*, 10 S.W.3d 323, 327-28 (Tex. Crim. App. 2000); *Morfin*, 34 S.W.3d at 666.

Imprecise laws can be attacked on their faces under two different doctrines. *City of Chicago v. Morales*, 527 U.S. 41, 52, 119 S. Ct. 1849, 1857 (1999). First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Id.; Broadrick v. Oklahoma*, 413 U.S. 601, 612-15, 93 S. Ct. 2908, 2916-18 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Morales*, 527 U.S. at 52, 119 S. Ct. at 1857; *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858 (1983).

OVERBREADTH

In the State's first four points of error, it argues that the trial court erred in concluding that the Bedford noise

ordinance is constitutionally overbroad. It is within the State's police power to protect the tranquility, quiet enjoyment, and well-being of the community. *Frieling v. State*, 67 S.W.3d 462, 472 (Tex. App. – Austin 2002, pet. ref'd). This right of the State is limited only by individual constitutional rights, such as First Amendment free speech. *Blanco v. State*, 761 S.W.2d 38, 40 (Tex. App. – Houston [14th Dist.] 1988, no pet.). Consequently, in analyzing a facial challenge to the overbreadth of a law, we first determine if the statute reaches a substantial amount of constitutionally protected conduct. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S. Ct. 1186, 1191 (1982); *Blanco*, 761 S.W.2d at 40. A statute will not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional applications. *Hoffman*, 455 U.S. at 494, 102 S. Ct. at 1191. Rather, the wide-reaching effects of striking down a statute on its face, at the request of one whose own conduct may be punished despite the First Amendment, has caused the Supreme Court to recognize that the "overbreadth doctrine is 'strong medicine'" and [courts should] employ it "with hesitation, and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 3361 (1982) (quoting *Broadrick*, 413 U.S. at 613, 93 S. Ct. at 2916).

We have reviewed several federal and state cases dealing with the constitutionality of noise ordinances, first turning to the United States Supreme Court's decision in *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294 (1972). That case involved equal rights protests by black students at a high school in Illinois during the 1960s. *Id.* at 105, 92 S. Ct. at 2297. One of the students, Richard Grayned, was found guilty of violating the city's noise

ordinance. *Id.* at 106, 92 S. Ct. at 2298. The Rockford ordinance read:

> No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.

Id. at 107-08, 92 S. Ct. at 2298. Grayned raised claims of both vagueness and overbreadth to attack his conviction. *Id.* at 108, 114, 92 S. Ct. at 2298, 2302. In holding that the Rockford ordinance was not invalid on its face, the *Grayned* court noted that the city had a compelling interest in preserving "an undisrupted school session conducive to the students' learning." *Id.* at 119, 92 S. Ct. at 2305. The ordinance, although restrictive of expressive behavior during the school session, was not overbroad because:

> Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. . . . Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted. And the ordinance gives no license to punish anyone because of what he is saying.

Id. at 119-20, 92 S. Ct. at 2305. Similarly, the Bedford ordinance restricts only those noises that "unreasonably disturb or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities"; it is neutral regarding content and location.

In *Ward v. Rock Against Racism*, the Supreme Court upheld New York City's volume control regulations for public outdoor concerts despite clear First Amendment protection for music because the city's interest in tranquility allowed it

to impose reasonable restrictions. 491 U.S. 781, 790, 109 S. Ct. 2746, 2753 (1989). According to the *Ward* court, "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* at 791, 109 S. Ct. at 2754. Under *Ward*, Bedford may impose reasonable restrictions on the time, place, or manner of constitutionally protected speech – even in a public forum. *Id.* at 791, 109 S. Ct. at 2753. A valid time, place, and manner restriction, however, must be content-neutral. *Id.* A restriction is content-neutral so long as it is "justified without reference to the content of the regulated speech." *Id.* (quoting *Clark v. Cmty. for Creative Non Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984)).

Bedford's stated policy is:

> to minimize the exposure of citizens to excessive noise and to protect, promote and preserve the public health, comfort, convenience, safety and welfare. It is the express intent of the city to control the level of noise in a manner which promotes commerce; protects the sleep and repose of citizens; promotes the use, value and enjoyment of property; and preserves the quality of the environment.

BEDFORD, TEX., CODE OF ORDINANCES ch. 54, art. II, § 32 (2002). As we previously noted, the Bedford noise ordinance does not reference content. Bedford simply desires to protect the tranquility of its citizens; and it is well established that the government may, within reasonable bounds regulate audible expression in its capacity as noise. *City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S. Ct. 2038, 2041 (1994) (citing *Ward*, 491 U.S. at 803, 109 S. Ct.

at 2760; *Kovacs v. Cooper*, 336 U.S. 77, 89, 69 S. Ct. 448, 455 (1949) (Frankfurter, J., concurring)).

Texas courts have also addressed the constitutionality of noise ordinances. *Thompson v. State*, No. 04-00-00348-CR, 2001 WL 38111, at *2 (Tex. App. – San Antonio Jan. 17, 2001, pet. ref'd) (not designated for publication), *cert. denied*, 534 U.S. 1129 (2002) (holding that the Texas unreasonable noise statute does not threaten constitutional conduct); *Schrader v. State*, No. 03-99-00780-CR, 2000 WL 1227866, at *2 (Tex.App. – Austin Aug. 31, 2000, no pet.) (not designated for publication), *cert. denied*, 532 U.S. 1040 (2001) (holding that city noise ordinance does not reach a substantial amount of constitutionally protected conduct); *Blanco*, 761 S.W.2d at 41 (holding that the Texas unreasonable noise statute does not reach a substantial amount of constitutionally protected conduct). In 1988, the Houston Fourteenth Court of Appeals upheld section 42.01(a)(5) of the Texas Penal Code, a disorderly conduct statute, which stated:

> A person commits an offense if he intentionally or knowingly . . . makes unreasonable noise in a public place or in or near a private residence that he has no right to occupy.

Act of May 23, 1983, 68th Leg., R.S., ch. 800, § 1, sec. 42.01, 1983 Tex. Gen. Laws 4641, 4641 (amended 1991) (current version at TEX. PENAL CODE ANN. § 42.01(a)(5) (Vernon 2003)); *Blanco*, 761 S.W.2d at 40, 42. The appeals court held that the statute fell within the State's police power to protect the tranquility of the community and that the breadth of the statute did not substantially impact constitutional rights. *Blanco*, 761 S.W.2d at 40.

Appellee argues that the Texas disorderly conduct statute can be distinguished from the Bedford ordinance because the scope of the Texas statute is limited in its encroachment on constitutionally protected conduct by a sister statute, which reads in pertinent part:

> If conduct that would otherwise violate Section 42.01(a)(5) . . . consists of speech or other communication, of gathering with others to hear or observe such speech communication, or of gathering with others to picket or otherwise express in a nonviolent manner a position on social, economic, political, or religious questions, the actor must be ordered to move, disperse, or otherwise remedy the violation prior to his arrest if he has not yet intentionally harmed the interests of others which [42.01(a)(5)] seek[s] to protect.

TEX. PENAL CODE ANN. § 42.04 (Vernon 2003). According to Appellee, the Texas statute affords adequate safeguards for constitutionally protected conduct, amplified by the specific intent element incorporated into section 42.01, that the Bedford ordinance does not. Consequently, Appellee asserts that *Blanco* cannot be relied upon as precedent for upholding the Bedford ordinance. The court of appeals in *Blanco*, however, noted in its opinion that "[e]ven without the speech defense of § 42.04, courts have held that unreasonable noise is not protected speech." *Blanco*, 761 S.W.2d at 40 (citing *Commonwealth v. Mastrangelo*, 489 Pa. 254, 263, 414 A.2d 54, 58, *appeal dismissed*, 449 U.S. 894 (1980); *Reeves v. McConn*, 631 F.2d 377, 378 (5th Cir. 1980); *Pringle v. Court of Common Pleas*, 778 F.2d 998, 999 (3rd Cir. 1985)).

In 2000, the Austin Court of Appeals, in an unpublished opinion, addressed the constitutionality of Austin's noise ordinance, which provided in relevant part:

> (a) It is unlawful for any person operating or controlling a motor vehicle in either a public or private place within the city to operate any sound amplifier which is part of, or connected to, any radio, stereo receiver, compact disc player, cassette tape player, or other similar device in the motor vehicle, in such a manner that, when operated, it is audible at a distance of thirty (30) feet or, when operated, causes a person to be aware of the vibration accompanying the sound at a distance of thirty (30) feet from the source.
>
> (b) The provisions of this section do not apply to:
>
> . . . .
>
> (2) Motor vehicle[s] used for business or political purposes, properly permitted, which in the normal course of business use sound making devices.

Schrader, 2000 WL 1227866, at *1 (quoting AUSTIN, TEX., MUNICIPAL CODE ch. 10-5, art. III, § 10-5-40 (1992)). In that case, Schrader was placed on two years' deferred adjudication after pleading guilty to possession of less than one gram of cocaine, which was discovered as a result of police enforcement of the Austin noise ordinance. The Austin Court of Appeals, recognizing that the question is whether the ordinance reaches a *substantial* amount of constitutional conduct, declined to strike down the ordinance. *Id.* at *4. The court noted that the ordinance does not restrict any expression or communication beyond limiting its loudness. *Id.* The court reasoned that although

the ordinance may restrict some First Amendment activity, the ordinance is justified by the city's interest in a peaceful environment. *Id.*

In 2001, the San Antonio Court of Appeals revisited the constitutionality of the Texas noise ordinance addressed in *Blanco*. *Thompson*, 2001 WL 38111, at *2. The court reiterated that other courts have held that unreasonable noise is not protected speech and concluded that section 42.01(a)(5) does not threaten constitutional conduct or speech. *Id.* (citing *Blanco*, 761 S.W.2d at 40-41).

We recognize that both *Schrader* and *Thompson* are unpublished and do not constitute binding precedent, but find their reasoning persuasive nonetheless – especially in light of other cases upholding noise ordinances as constitutional. *See Grayned*, 408 U.S. at 119-20, 92 S. Ct. at 2305; *Kovacs*, 336 U.S. at 83, 69 S. Ct. at 451; *Reeves*, 631 F.2d at 382. We therefore conclude that the Bedford noise ordinance does not reach a substantial amount of First Amendment activity and is not constitutionally overbroad. As with the ordinance addressed in *Schrader*, the Bedford noise ordinance is content-neutral and regulates only the volume of expression.

VAGUENESS

In the State's fifth and sixth points of error, it argues that the Bedford noise ordinance is not unconstitutionally vague. Although the State recognizes in its brief that the trial court granted Appellee's motion to suppress based only on a finding of overbreadth, the State addresses vagueness based on a case in which both the court of appeals and the court of criminal appeals considered a vagueness challenge to the penal code even though the

trial court's decision turned on the overbreadth challenge. *See State v. Markovich*, 34 S.W.3d 21, 25 n.2 (Tex. App. – Austin 2000), *aff'd*, 77 S.W.3d 274 (Tex. Crim. App. 2002).

In addition to being limited by free speech protections, Bedford's police power to protect a peaceful environment is further limited by the requirement that a criminal statute must give a person of ordinary intelligence what conduct is prohibited. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S. Ct. 839, 843 (1972); *Cuellar v. State*, 70 S.W.3d 815, 822 (Tex. Crim. App. 2002) (Cochran, J., concurring); *Morgan v. State*, 557 S.W.2d 512, 514 (Tex. 1977). If a statute does not substantially implicate constitutionally protected conduct or speech, it is valid unless it is impermissibly vague in all applications. *Hoffman Estates*, 455 U.S. at 494-95, 102 S. Ct. at 1191. The vagueness doctrine is based on fairness and "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Colten v. Commonwealth of Kentucky*, 407 U.S. 104, 110, 92 S. Ct. 1953, 1957 (1972).

Vagueness may invalidate a criminal law for either of two independent reasons. First, the law may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. *See Kolender*, 461 U.S. at 357, 103 S. Ct. at 1858. In order to pass a vagueness challenge, a criminal statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Grayned*, 408 U.S. at 108, 92 S. Ct. at 2298-99; *Long v.*

State, 931 S.W.2d 285, 287 (Tex. 1996); *Sisk v. State*, 74 S.W.3d 893, 901 (Tex.App. – Fort Worth 2002, no pet.). Furthermore, where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression. *Long*, 931 S.W.2d at 287; *Sisk*, 74 S.W.3d at 901. A statute is not unconstitutionally vague merely because it fails to define words or phrases. *Engelking v. State*, 750 S.W.2d 213, 215 (Tex. Crim. App. 1988); *Ahearn v. State*, 588 S.W.2d 327, 337-38 (Tex. Crim. App. [Panel Op.] 1979). If the statute affects communication protected by the First Amendment, a defendant has standing to challenge the statute as vague on its face, even if it does not affect his own First Amendment rights. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 59-60, 96 S. Ct. 2440, 2447 (1976); *Long*, 931 S.W.2d at 287-88.

Appellee argues that the meaning of the phrase "unreasonably disturbs or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities, unless a permit of variance is first obtained," which is included in the ordinance, is left to the imagination of the police, public, and the courts. Specifically, Appellee appears to challenge the terms "persons," "interfere," "repose," and "permit of variance."

Words defined in dictionaries with meanings so well known as to be understood by a person of ordinary intelligence have been held not to be vague and indefinite. *Floyd v. State*, 575 S.W.2d 21, 23 (Tex. Crim. App. [Panel; Op.] 1978), *appeal dism'd*, 442 U.S. 907 (1979); *Ex parte Anderson*, 902 S.W.2d 695, 700 (Tex. App. – Austin 1995, pet. ref'd). What we must do, then, is "to find the meaning of some not very difficult words." *N. Sec. Co. v. United States*, 193 U.S. 197, 401, 24 S. Ct. 436, 468 (1904) (Holmes, J., dissenting). First, "person" is defined by section 54-31 of

the Bedford municipal code as "any individual, firm, association, partnership, corporation or any other entity, public or private." BEDFORD, TEX., CODE OF ORDINANCES ch. 54., art. II, § 31 (2002). This definition is more than sufficiently clear to place a person of ordinary intelligence on notice of whose comfort and repose may not be unreasonably disturbed. Further, the term "persons" is limited to only those persons of ordinary sensibilities, i.e., an objective reasonable person standard.

As recognized by other Texas courts, the terms "interfere" and "repose" also have commonly understood meanings. *Ex parte Hunter*, 188 S.W.2d 162, 163 (Tex. Crim. App. 1945) (stating, "We are unable to sustain the relator's contention that the ordinance is indefinite in that it does not define what is meant by 'frequent or long continued noise,' 'comfort and repose,' and 'neighborhood.' Such terms are of general use and may be understood.") (orig. proceeding); *Markovich*, 34 S.W.3d at 25 (stating that term "interfere" has a commonly understood meaning); *Morehead v. State*, 746 S.W.2d 830, 837 (Tex. App. – Dallas 1988), *rev'd on other grounds*, 807 S.W.2d 577 (Tex. Crim. App. 1991) (holding that term "interfere" in statute prohibiting the disruption of a lawful meeting was not vague); *Winthrop v. State*, 735 S.W.2d 545, 547 (Tex. App. – Houston [1st Dist.] 1987, pet. ref'd) (stating term "interfere" in child enticing statute was not so vague as to violate state and federal due process provisions).

Finally, Appellee argues that the ordinance is unclear as to the criteria for obtaining a "permit of variance." The Bedford municipal code, however, extensively describes the process and criteria for obtaining a permit of variance. BEDFORD, TEX., CODE OF ORDINANCES ch. 54, art. II, § 38

(2002). For example, section 54-38 of the code authorizes the city manager to grant permits if it is found:

> a. That additional time is necessary for the applicant to alter or modify the activity or operation to comply with this article; or
>
> b. That the activity, operation or noise source will be of temporary duration and cannot be done in a manner that would comply with other provisions of this article; and
>
> c. That no other reasonable alternative is available to the applicant; and
>
> d. That the city may prescribe any conditions or requirements deemed necessary to minimize adverse effects upon the community or the surrounding neighborhood.

Id.

Appellee additionally argues that the Bedford noise ordinance contains no specific and objective criteria for determining if any particular noise was too loud. We disagree. The ordinance's reference to "neighboring persons of ordinary sensibilities" and ban against noise that is unreasonable establish an objective reasonable person standard. This objective standard ensures that those of ordinary intelligence have a reasonable opportunity to know what is prohibited. We conclude that the Bedford noise ordinance adequately describes the prohibited conduct and does not permit arbitrary or discriminatory enforcement. We sustain the State's fifth and sixth points of error.

THE REASONABLENESS OF THE STOP

In the State's seventh and final point of error, it argues that the trial court erred in granting the motion to suppress because the stop of Appellee's vehicle was reasonable. Because we sustain the State's overbreadth and vagueness points, we do not address the State's seventh point. *See* TEX. R. APP. P. 47.1.

CONCLUSION

Having sustained Appellant's first six points, we reverse the trial court's judgment and remand this case for a trial on the merits.

/s/ Dixon W. Holman
DIXON W. HOLMAN
JUSTICE

PANEL B: DAUPHINOT, HOLMAN, and McCOY, JJ.

DAUPHINOT, J. filed a dissenting opinion.

PUBLISH

DELIVERED: April 22, 2004

DISSENTING OPINION

Although the majority opinion is thoughtfully and carefully researched and written, I must respectfully dissent because the majority writes to reverse the well-founded decision of the trial judge.

In reviewing the trial judge's ruling, we apply a de novo standard of review as to questions of law and afford almost total deference to the trial judge's determination of facts.[1] Moreover, if the trial court's ruling on a matter of law is correct under any theory of law, even if the trial court gives the wrong reason for its ruling, we must affirm the trial court's decision.[2]

In *May v. State*,[3] the Texas Court of Criminal Appeals held that former section 42.07 of the Texas Penal Code, prior to its amendment in 1983, was unconstitutional. As the *May* opinion provides, that former statute read, in pertinent part:

> (a) A person commits an offense if he intentionally:
>
> . . .
>
> (2) threatens, by telephone or in writing, to take unlawful action against any person and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient or intends to annoy or alarm the recipient; or
>
> (3) places one or more telephone calls anonymously, at an unreasonable hour, in an offensive and repetitious manner, or without a legitimate

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[1] *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

[2] *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Couchman v. State*, 3 S.W.3d 155, 158 (Tex. App. – Fort Worth 1999, pet. ref'd); *Pettigrew v. State*, 908 S.W.2d 563, 568 (Tex. App. – Fort Worth 1995, pet. ref'd); *see also In re ExxonMobil Corp.*, 97 S.W.3d 353, 365 (Tex. App. – Houston [14th Dist.] 2003, orig. proceeding); *Luxenberg v. Marshall*, 835 S.W.2d 136, 141-42 (Tex. App. – Dallas 1992, orig. proceeding).

[3] 765 S.W.2d 438, 440 (Tex. Crim. App. 1989) (op. on reh'g).

> purpose of communication and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient.[4]

The *May* Court, citing *Kramer v. State*,[5] concluded that the statute was void for vagueness because of its failure to 1) adequately define what annoys and alarms people and 2) specify whose sensitivities must be offended.[6]

The ordinance now before us provides in pertinent part that a "noise disturbance" is

> [o]perating or permitting to be operated any radio . . . in such a manner as to violate the sound levels of this article or to unreasonably disturb or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities, unless a permit of variance is first obtained.[7]

The Bedford police officers variously described the music from Appellee's radio as "so loud," played at an extremely high level," and louder than the noise at the party. The officer who stopped Appellee's car said he stopped Appellee because he believed that Appellee was violating the Bedford noise ordinance.

Our sister court in Houston has pointed out:

> All criminal laws must give fair notice to the populace as to what activity is made criminal so that

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[4] *Id.* at 439.

[5] 605 S.W.2d 861 (Tex. Crim. App. [Panel Op.] 1980).

[6] *May*, 765 S.W.2d at 440.

[7] BEDFORD, TEX., CODE 1969 § 12-55 (recodified at BEDFORD, TEX., CODE OF ORDINANCES ch. 54, art. II, § 36 (2002)).

> individuals have fair warning of what is forbidden. Criminal statutes must provide an objective standard by which a person's conduct can be measured. A statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.
>
> To determine whether a law provides fair notice requires a two-step process. First, we must determine whether appellant, as an ordinary person, received sufficient information from the statute to understand exactly what conduct is prohibited so that she could act in a lawful manner. Second, we must determine whether [the law] provides sufficient notice of the prohibited conduct to law enforcement personnel, so that appellant is not arbitrarily or discriminatorily prosecuted by the State or convicted by the jury.[8]

The standard for determining the vagueness issue was established in *City of Jacksonville*, in which the United States Supreme Court held that a statute is void for vagueness when it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden, it encourages arbitrary and erratic arrests and convictions, makes criminal those activities which by modern standards are normally innocent, and places almost unfettered discretion in the hands of the police.[9]

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[8] *Weyandt v. State*, 35 S.W.3d 144, 155 (Tex. App. – Houston [14th Dist.] 2000, no pet.) (citations omitted).

[9] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-71, 92 S. Ct. 839, 843-48 (1972).

In the case now before this court, the trial judge announced that the ordinance in question is unconstitutionally overbroad and void for vagueness. The findings of fact and conclusions of law that appear in the record address only the overbreadth holding. It is clear from reading the record as a whole that the trial judge was concerned that the ordinance was actually unconstitutionally vague for its failure to afford fair notice of the prohibited conduct and its failure to establish objective standards for determining whether a violation has occurred. The consequence of such failures is to leave to the police officers the unbridled discretion to judge whether a violation of the ordinance has occurred.

We cannot tell from the record how loudly the radio was playing, except that it was so loud, played at an extremely high level, or could be heard at a particular distance. An ordinance that prohibits noise above a certain decibel level or that can be heard at a specific distance under specific circumstances provides objective standards. The Bedford ordinance does not. Whether a violation of the Bedford ordinance occurs depends only on the police officers' determination of what is too loud and what unreasonably disturbs or interferes with the peace, comfort, and repose of neighboring persons. Indeed, in the case before us, the police officers alone determined who were "neighboring persons."

The Bedford ordinance appears to be constitutionally infirm for the very reasons the Texas Court of Criminal Appeals held the telephone harassment statute void for vagueness in *May*, and for similar reasons supporting the Supreme Court's holding in *City of Jacksonville.* I would hold that the trial court did not err in declaring the Bedford ordinance unconstitutional and granting Appellee's

motion to suppress. Because the majority holds that the trial court did err, I must respectfully dissent.

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

PUBLISH

DELIVERED: April 22, 2004

[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-02-515-CR

The State of Texas	§	From County Criminal Court No. 9
	§	of Tarrant County (0846280)
	§	
v.	§	April 22, 2004
	§	
	§	Opinion by Justice Holman
	§	
	§	Dissent by Justice Dauphinot
Stephen John	§	
Holcombe	§	(p)

JUDGMENT

This court has considered the record on appeal in this case and holds that there was error in the trial court's judgment. It is ordered that the judgment of the trial court is reversed and remanded for a trial on the merits.

It is further ordered that the State of Texas shall pay all of the costs of this appeal, for which let execution issue.

/s/ Dixon W. Holman

No. 0846280

STATE OF TEXAS	§	IN THE COUNTY CRIMINAL
	§	
vs.	§	COURT NUMBER NINE OF
STEPHEN JOHN	§	
HOLCOMBE	§	TARRANT COUNTY, TEXAS

STATE'S PROPOSED ORDER

(Filed December 6, 2002)

The State proposes the following ORDER AFTER SUPPRESSION HEARING regarding the issues raised in the Defendant's motion to suppress which was heard by this Court on November 21, 2002.

ORDER AFTER SUPPRESSION HEARING

Defendant was charged with DWI – misdemeanor repetition. Pursuant to the Defendant's filing of a motion to suppress, evidence was heard. As of this date, no written order has been entered regarding the motion to suppress. A docket entry does not constitute a written order. *See State v. Shaw*, 4 S.W.3d 875, 877-78 (Tex.Cr.App. 1999, no pet.); *State v. Acosta*, 948 S.W.2d 555, 556 (Tex.App. – Waco 1997, no pet). *See also State v. Kibler*, 874 S.W.2d 330, 332 (Tex. App. – Fort Worth 1994, no pet.) (trial court's oral announcement of its decision in open court was not final until the trial judge signed the written order).

In light of the Defendant's contentions and the arguments and authorities of both parties presented at the hearing on the Defendant's motion to suppress, this Court finds that stop of the defendant was invalid because the

city of Bedford noise ordinance which was the basis for the initial stop of the Defendant is unconstitutional due to its being overbroad. Therefore, the Defendant's motion to suppress is GRANTED.

Respectfully submitted,

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Criminal District Attorney
Tarrant County, Texas

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State Bar No. 02760900

CERTIFICATE OF SERVICE

A true copy of the above Proposed Order After Suppression Hearing has been faxed to opposing counsel, the Hon. Steve Gordon, Jim Lollar & Associates, P.C., 6200 Airport Freeway, Fort Worth, TX, 76117 at telephone number 817/817-5977 on this, the 6th day of December 2002.

/s/ Tanya S. Dohoney
TANYA S. DOHONEY,

No. 0846280

STATE OF TEXAS	§	IN THE COUNTY CRIMINAL
	§	
vs.	§	COURT NUMBER NINE OF
STEPHEN JOHN	§	
HOLCOMBE	§	TARRANT COUNTY, TEXAS

ORDER AFTER SUPPRESSION HEARING

The Court adopts the above proposed order as its own.

SIGNED AND ENTERED this 12 day of December, 2002.

/s/ Jake Cook
JUDGE PRESIDING

[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-02-515-CR

THE STATE OF TEXAS — STATE

V.

STEPHEN JOHN HOLCOMBE — APPELLEE

FROM COUNTY CRIMINAL
COURT NO. 9 OF TARRANT COUNTY

ORDER

We have considered "Appellee's Motion For Rehearing."

It is the opinion of the court that the motion for rehearing should be and is hereby denied and that the opinion and judgment of April 22, 2004, stand unchanged.

The clerk of this court is directed to transmit a copy of this order to the attorneys of record.

SIGNED July 15, 2004.

/s/ Dixon W. Holman
DIXON W. HOLMAN
JUSTICE

PANEL B: DAUPHINOT, HOLMAN, and McCOY, JJ.
DAUPHINOT, J. would grant.

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

[POST MARK Apr. 27, 2005]

4/27/2005
COA#: 02-02-00515-CR
RE: Case No. PD-1297-04
STYLE: STATE OF TEXAS VS. HOLCOMBE, STEPHEN JOHN

On this day, the appellee's petition for discretionary review has been granted. The original and eleven copies of the appellee's brief must be filed with this Court within 30 days. The State's brief is due 30 days after the timely filing of the Appellee's brief.

NO ORAL ARGUMENT IS PERMITTED

Troy C. Bennett, Jr.

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